Wilkes-Barre Publishing Company and Dorothy Kay Martin. Case 4-CA-12289

March 7, 1983

DECISION AND ORDER

By Chairman Miller and Members Jenkins and Zimmerman

On October 20, 1982, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief and a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the rulings, ¹ findings, ² and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

266 NLRB No. 87

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me in Wilkes-Barre, Pennsylvania, on August 19, 1982, upon an unfair labor practice charge filed on July 30, 1981, and a complaint which issued on December 22, 1981, alleging that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act, by discharging Dorothy Kay Martin "because it believed that . . . [she] . . . sympathized with and supported the Union." In its duly filed answer, Respondent denies that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and Respondent.

Upon the entire record in this proceeding, including my opportunity directly to observe the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs, it is hereby found as follows:

FINDINGS OF FACT

1. JURISDICTION

Respondent is a Pennsylvania corporation engaged in the business of publishing a daily newspaper in Wilkes-Barre, Pennsylvania. In the course of said operation, during the calendar year preceding issuance of the complaint, Respondent derived gross revenues exceeding \$500,000 and purchased and received at its Wilkes-Barre, Pennsylvania, facility products, goods, and materials exceeding \$50,000 in value which were shipped directly from points located outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Wilkes-Barre Printing Pressmen and Assistants Union, Local 137, herein called the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

This case presents a novel question as to whether Respondent violated the Act by discharging strikebreaker Martin because she placed an advertisement in a competing newspaper, which in substantial respects was organized, managed, and produced by Respondent's striking employees.

By way of background, it is noted that Respondent publishes a daily, except Sunday, newspaper called the Times Leader, a publication whose principle focus is the advertiser and reader in the immediate community of Wilkes-Barre, Pennsylvania. For several decades prior to 1978, the Times Leader had been the only daily periodical published in that market.

¹ Respondent contends that the Administrative Law Judge denied it "due process and requisite fundamental fairness" by dismissing its motion to require the General Counsel "to disclose any and all material evidence . . . which is exculpatory in nature." As we are dismissing the complaint herein, we deem it unnecessary to rule on the Administrative Law Judge's denial of said motion.

² We agree with the Administrative Law Judge that Respondent, the owner of the Times Leader, did not violate the Act by discharging Dorothy Kay Martin, a strike replacement, because she placed an advertisement promoting her private business in Citizen's Voice, a competing newspaper, which was organized, managed, and produced by Respondent's striking employees. In this connection, the Administrative Law Judge properly found that Martin's placement of the advertisement for the sole purpose of furthering her personal business interest was not an activity protected by Sec. 7 of the Act. However, we do not rely on the Administrative Law Judge's additional finding that "the discharge was not shown to have been motivated by any continuing hostility on Respondent's part toward the strikers." Although Respondent may have been so motivated, the crucial and determinative consideration on which we rely in finding no violation is that Martin's conduct was not protected because it did not constitute concerted activity for the purpose of collective bargaining or aiding the strikers.

Also prior to 1978, Respondent's employees were represented by four different labor organizations. Apparently in connection with a collective-bargaining dispute, on October 6, 1978, the employees struck. Shortly after the strike began, and in October 1978, a new daily newspaper appeared in Wilkes-Barre. It was called the Citizen's Voice and like the Times Leader was published on a daily, except Sunday, basis. The former was published by a corporate entity known as the Wilkes-Barre Council of Newspaper Unions, which was incorporated by four individuals, each of whom was a former employee of Respondent, and participant in the strike. The staff of the Citizen's Voice, from its inception, had been composed partially of striking employees.

Since October 1978, picketing has continued at Respondent's premises in Wilkes-Barre. During that same period, the Citizen's Voice has continued to engage in direct competition with the Times Leader in every respect including advertising, readership, circulation, and news coverage. As should be obvious, the new newspaper has grown to a level presenting serious competition in what would appear to be a circumscribed market area. (See ALJ Exh. 2.)

Charging Party Martin was hired by Respondent as a permanent strike replacement on December 4, 1978. She was discharged on May 21, 1981. Prior thereto, for some 2-1/2 years she crossed the picket line on a daily basis to report for work, and had no apparent allegiances or ties to any of the aforementioned labor organizations or strikers.¹

Prior to the discharge, in addition to her employment with Respondent, Martin operated an independent business in the form of an ice cream/hot dog stand at Harvey's Lake, Pennsylvania, a resort located near Wilkes-Barre. To promote the stand, Martin elected to sponsor a flea market in an adjacent parking lot at Harvey's Lake on May 24, 1981.² The flea market was advertised by Martin in the May 21 edition of both the Citizen's Voice and the Times Leader.³

The ad placed in the Citizen's Voice was discovered by Respondent's officials that same day. In connection therewith, also on May 21, Martin had several conversations with Richard Connor, Respondent's publisher. Martin described the first such conversation as follows:

Q. Could you tell us what was said, and by whom?

A. Mr. Connor asked me if I had placed the ad in the Citizen's Voice, and I told him yes, I did. At that point, he asked me who paid me.

I explained to him that the Times Leader paid me, but that my business and my profession were two separate entities. He explained to me that the sole purpose of the Citizen's Voice is to put the Times Leader out of business, and that by placing an ad in the Citizen's Voice, I had allowed them to buy one more piece of paper, one more pencil, and stay in business one second longer.

At that point, he told me that this is a war, and I gave weapons to the enemy, and he charged me with an act of treason. He told me that he would have to meet with administrative personnel to decide what to do with me, but that he was afraid that he would have to ask me to leave the paper.

Q. And did you say anything in response to these comments, by Mr. Connor?

A. I told Mr. Connor that I didn't realize he felt as strongly as he did about it, and that now that I knew, I could assure him it would never happen again.

Martin then returned to her work area, but while taking a coffeebreak encountered Connor who apparently was en route to the office of Personnel Director Daris. At that point, according to Martin's uncontradicted testimony, the following conversation ensued:

Q. Did you and Mr. Connor have a conversation at that point?

A. Yes. I stopped Mr. Connor and I asked—I told him that I did not place the ad in the Citizen's Voice out of disloyalty for the Times Leader and I hoped he didn't believe that. I told him that if I didn't believe in the "Times Leader" I wouldn't have worked there for two-and-a-half years.

I told him that I was sorry it had happened, but I wanted him to know that I didn't do it out of disloyalty for the Times Leader.

Q. Did Mr. Connor respond?

A. He told me that he couldn't believe that. It was a very serious matter and they were going to have a meeting to discuss what to do with me.

Martin was informed of her discharge in a confrontation with Connor which occurred about 10 minutes later. Martin's testimony as to what transpired on that occasion is set forth below:

Mr. Connor... told me that this was a very serious matter and that he was afraid he would have to ask me to leave the Times Leader. I told him then that I was not going to quit that job. I did not want to quit the job.

And he said to me that, "I'm telling you to leave. You're fired."

At that point I asked Mr. Connor if there wasn't something else we could do, and he said to me, "There's nothing else I'm willing to do. I don't believe in suspensions." At that point he told me to clean out my desk, pick up my paycheck from the

¹ Martin worked in the collective-bargaining unit formerly represented by the Newspaper Guild of Wilkes-Barre, Local 120. In February 1980, that Union was decertified as the statutory representative of said unit in an election conducted by the National Labor Relations Board.

² All dates refer to 1981 unless otherwise indicated.

³ Martin used her own name to place the ad in the Times Leader. She used someone else's name in placing the ad in the Citizen's Voice out of concern that the latter might use the fact that an employee of Respondent placed such an ad as a further item of propaganda against the Times Leader.

personnel director, and that would be my last day of work.⁴

Beyond the foregoing, it was conceded that Respondent had no written policy restricting employees from placing advertisements in rival newspapers including the Citizen's Voice. It is also clear that Martin placed the ad in both newspapers solely to promote the flea market and her personal business pursuits. She had no intention of aiding the strikers and, in the total circumstances, it is entirely unlikely that Respondent's officials would have interpreted the advertisement as having been for reasons other than Martin's desire to reach as many readers as possible. Finally, there is no dispute that Martin's termination was triggered solely by her having placed the advertisement in the Citizen's Voice.

Respondent defends on various grounds, including observation that Martin had no intention to engage in activity in aid of the strike or striking employees, but acted solely in pursuit of her personal business interests in utilizing the circulation strength of the Citizen's Voice. Thus, Respondent contends that a discharge, so grounded, is beyond statutory proscriptions. The General Counsel, on the other hand, argues that Martin's placement of the ad in the Citizen's Voice was a "financial contribution" to the strikers or their union and hence, irrespective of her intent, was protected by Section 7 of the Act. The view that Board remedies are available to those who, without intent or purpose, engage in conduct which in effect supports employees engaged in protected activity, is urged upon me on the basis of precedent involving employees disciplined for refusing to cross picket lines⁵ or who engage in conduct at the site of and associated with an immediate boycott.6 As observed by the General Counsel, the Board has stated in such a context that it is the nature of the employee's activity, as distinguished from intent, which determines protected status.7 However, the cases cited by the General Counsel in this respect are viewed as inapposite. Unlike a refusal to cross a protected picket line or other forms of support of a boycott, the placement of an advertisement in a newspaper, even if the latter is formed and maintained by strikers, is viewed as too remote from activity protected by Section 7 of the Act to be deemed protected. The Citizen's Voice is an entrepreneural venture which, though derived from strike action, has achieved solid foundation as a business rival of Respondent. To the extent that strikers are involved, their abilities, experience, and resources have been channeled into a product which in very real terms competes with the Times Leader for revenues in a market coextensive with that historically served by the latter. The question presented is whether "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

ought to be extended to favor one business competitor over another simply because the former was organized and maintained by aggrieved employees of the latter. To ask the question is to answer it.

Board precedent is not insensitive to the possibility that, under the guise of protected activity, a conflict of interest or indeed even business advantage might be fostered through intervention of statutory remedies. See, e.g., Bausch & Lomb Optical Company, 108 NLRB 1555 (1954). Thus, the Board has held that "an employer is justified in refusing to bargain with a Union which is engaged in a directly competitive business, even though the Union has not abused its power as a labor organization in pursuit of business objectives." See also Visiting Nurses Association, Inc. Serving Alameda County, 254 NLRB 49 (1981). It would be difficult to conceive of a more clearcut example of a "directly competitive business" than that presented by the Citizen's Voice. The discharge of an employee for patronizing the latter was no more an interference with statutory guarantees than other forms of competitive pressure that might be invoked by Respondent designed to neutralize the strength and market influence of the Citizen's Voice. In short, Respondent was free to meet the competitive challenge presented by the latter without limitation or constraint from the National Labor Relations Act. The newspaper founded and maintained by the strikers is not, for purposes of Section 7 of the Act, the analogue of strike action, and hence, contrary to the General Counsel, Martin's placement of the ad did not have inherent characteristics of statutorilly protected conduct.

This, however, does not end the inquiry. For the General Counsel argues that, even if Martin's conduct is not viewed as protected, the violation nonetheless is substantiated on evidence that Respondent terminated her because it "believed" that she placed the advertisement with the intention of aiding the striking employees and union in connection with the underlying labor dispute. The facts, however, warrant no such finding. There is no basis on this record for assuming that management suspected that Martin held allegiance or sympathy toward the strike, the strikers, or the striking unions. Indeed, as a strike replacement, who crossed the picket line every day for the 2-1/2-year duration of her employment, her deportment hardly reflected a prolabor posture. Her entire course of conduct convincingly attested to the probability and truthfulness of her explanation to Connor that she patronized the Citizen's Voice solely to further her personal business interest.

In what appears to be a final thrust, the General Counsel urges that, even if Respondent did not believe that Martin was engaged in protected activity, the discharge should be deemed unlawful as motivated by a continuing vendetta against the strikers. To support such an inference the General Counsel argues that Connor "reacted so vehemently" not because of the "inconsequential loss of business" produced by the advertisement, but because of the "prolonged labor dispute which had spawned the Citizen's Voice." Here again, the General Counsel's view is lacking in merit. Connor's emotional and perhaps even irrational response was not beyond comprehension in the

⁴ Before leaving that day, Martin testified to further confrontations with Connor in connection with her request for written documentation of the reason for her discharge. Those encounters are not viewed as contributing materially to the issues presented.

⁵ See, e.g., Browning-Ferris Industries, Chemical Services, Inc., 259 NLRB 60 (1981).

⁶ See Coors Container Company, 238 NLRB 1312, 1318 (1978)

⁷ See Smithfield Packing Co., 258 NLRB 261 (1981); Brown & Root, Inc., 246 NLRB 33, 36-37 (1979); and Ohio Valley Graphic Arts, Inc., 234 NLRB 493 (1978).

circumstances. The Citizen's Voice was Respondent's sole rival based in Wilkes-Barre whose publication primarily was addressed to the readers and advertisers in that immediate locale. Common experience leads to the realization that few municipalities comparable in size to Wilkes-Barre are capable of supporting more than one daily newspaper in this day and age. On all appearances, the Citizen's Voice is and has been a successful venture, and one which imposes a serious threat to the competitive position, profitability, and perhaps even the existence of the Times Leader. Respondent's sensitivity in the light of these facts does not impel a conclusion that Connor was provoked by considerations other than hostility toward a new, but significant, competitive force in a market which for some 40-50 years had been the exclusive realm of Respondent.8 In my opinion, the General Counsel's view of the evidence is founded on little more than speculation and flirtation with an unwarranted substitution of business judgment.

For the foregoing reasons, it is found that Martin did not engage in activity protected by Section 7 of the Act, that Respondent did not believe that she had done so, and that the discharge was not shown to have been motivated by any continuing hostility on Respondent's part toward the strikers. Accordingly, the allegation that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Martin shall be dismissed.

CONCLUSIONS OF LAW

- 1. Wilkes-Barre Publishing Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. Wilkes-Barre Printing Pressmen and Assistants Union, Local 137, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent Wilkes-Barre Publishing Company did not violate Section 8(a)(3) and (1) of the Act by on May 21, 1981, terminating Dorothy Kay Martin.

Upon the foregoing findings of fact and conclusions of law, upon the entire record in this proceeding and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER9

It is hereby ordered that the complaint herein be, and hereby is, dismissed in its entirety.

^{*} See Wolf Street Supermarkets, Inc. d/b/a Jim's Big M: and Big M Supermarkets, Inc., 264 NLRB 1124, fn. 2 (1982).

⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.